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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC.,
Petitioner,

v.

NATIONAL THEATRES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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April 3, 1958.

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Opinions Below

The original opinion of the Court of Appeals (Judge Learned Hand dissenting) and the opinion on re-hearing are reported in 248 F. (2d) 833. The opinion of the District Court is reported in 140 F. Supp. 909. The findings of fact and conclusions of law of the District Court are not reported but are annexed to the petition as an appendix. The opinion of the District Court directing that the statute of limitations issue be tried to the court without a jury and the order of dismissal are not reported. Both are printed in the appendix to the petition for certiorari in *National Theatres Corporation* v. *Bertha Building Corporation*, Docket No. 761, October Term, 1957.*

*All of the stock of the petitioner here and the respondent Bertha Building Corporation in No. 761 was owned by one H. L. Gumbiner. The complaints in the two actions were filed on the same day and the

Jurisdiction

The judgment sought to be reviewed was entered on November 7, 1957. Petitioner's motion for a re-hearing was denied on December 6, 1957. The jurisdiction of this Court is invoked pursuant to the provisions of Section 1254(1) of Title 28, United States Code.

The Questions Presented

Except that respondent does not agree with the holding of the court below that petitioner was entitled to a jury trial of the jurisdiction and venue issues presented by its statute of limitations defense, the decision sought to be reviewed was correct. It is not in conflict with any decision of this Court or with any decision of any other court of appeal. Under

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actions were consolidated for the trial of defendant's statute of limitations defense. The respondent here is the petitioner in No. 761 and it was the only defendant in each case, the statute of limitations being an admitted bar as to all the alleged co-conspirators. The issues tried below were whether National Theatres Corporation could have been sued in California for three years or in New York for six years after the causes of action accrued. The District Court dismissed both complaints as barred by the three year California statute. It also held that the complaint of petitioner Gumbiner Theatrical Enterprises was barred by the six-year New York statute and should be dismissed for that reason as well. Plaintiffs in both cases appealed to the court below and the appeals were heard together on one record. In its original decision, the Court of Appeals held that plaintiffs were entitled to a jury trial of the jurisdiction and venue issues raised by the California statute of limitations defense and reversed the judgments and remanded the cases for a new trial. On defendant-appellee's petition for a re-hearing, the court below amended its original decision and affirmed the judgment of the District Court dismissing the Gumbiner Theatrical complaint as barred by the New York statute of limitations. It is from that judgment that petitioner here seeks a review by this Court. The court below adhered to its original decision in the Bertha Building case, holding that plaintiff was entitled to a jury trial of the issues raised by the California statute of limitations defense and the defendant-appellee in that case (respondent here) duly filed its petition for certiorari. The record on that petition, Docket No. 761, contains the printed appendices and the proceedings below. Reference is made to that record in this brief

the circumstances the only questions which could be raised by this petition appear to be as follows:

1. Was it error for the court below to affirm the judgment dismissing the complaint as barred where the District Court would have been required to direct a verdict in defendant's favor if the trial of the jurisdiction and venue issues raised by the statute of limitations defense had been held to the court and jury?

2. Did the court below correctly hold that respondent both directly and through its agents transacted business in New York?

3. Absent any element of estoppel, was respondent precluded from showing its actual business activities in New York?

The Statutes Involved

The pertinent statutes involved are Sections 4 and 12 of the Clayton Act (38 Stat. 731, 736; 15 U. S. C. §§ 15, 22) and Section 19 of the New York Civil Practice Act, the texts of which are set out as an appendix to this brief.

Statement

Much of the material pertinent to respondent's statement has been set forth in its own petition in *National Theatres Corporation* v. *Bertha Building Corporation*, No. 761 now pending before this Court. Since it appears that the petition in that case will be circulated at the same time as this petition, respondent respectfully refers this Court to its statement there and will not repeat matters contained therein, except to the extent necessary for an understanding of the issues involved on this petition.

Petitioner commenced its action against respondent under the anti-trust laws in the Eastern District of New York on September 5, 1951. The complaint alleged that petitioner was injured in its property and business of operating the Los

Angeles theatre in Los Angeles, California, prior to December 8, 1931. It is conceded that petitioner's cause of action accrued in California no later than that date. It is also conceded that if respondent could have been sued in New York for six years after December 8, 1931, or in California for three years, petitioner's claim is barred. This action was commenced against respondent nearly twenty years later. Respondent is the only defendant.

A separate trial of respondent's statute of limitations defense was held on December 12-16, 1955. On March 28, 1956, District Judge Galston rendered his decision in which he held that respondent had been amenable to suit both in California and New York throughout the period from December 8, 1931, to July 20, 1938, and dismissed the complaint as barred by the statutes of limitations of both states.

In its statement of the case petitioner is plainly in error when it asserts (Pet. 9) that the District Court did not consider respondent's business activities in New York and did not hold that petitioner's claim was barred in New York. Building upon that false premise, petitioner mis-states the proceedings below when it asserts (Pet. 11-13) that the court below made its own insupportable and unwarranted findings with respect to respondent's business activities in New York. For the District Court unequivocally held that petitioner's claim was barred in New York and made extensive findings and conclusions to that effect. After holding that the claims in both this case and the companion *Bertha Building* case, No. 761, were barred by the California three-year statute, the District Court stated that it was unnecessary to discuss, in its opinion, the bar of the New York statute. It noted that its findings were sufficient for that purpose, saying (Pet. 34a):

> "Nor is it necessary, therefore, to discuss the New York statute of limitations, and the allegations of the plaintiffs in respect to their contention that the defendant was not doing business in New York during

> the critical years. It is sufficient for that purpose to refer to the findings which will be filed concurrently with this opinion. They are necessarily multiple because of the voluminous record."

The District Court then concluded its opinion with the express statement that the action was barred in New York (Pet. 35a):

> "Defendant was amenable to suits in both California and New York, and they should be precluded from maintaining actions sixteen and twenty years respectively after the alleged causes of action accrued. The complaints are dismissed."

This conclusion is reflected in the District Court's findings. Finding 50, which summarizes respondent's various and substantial activities in New York, concludes as follows (Pet. 59-60a):

> "The court finds that National could have been sued in New York during that period and that the claim of the plaintiff Gumbiner Theatrical Enterprises is barred by the New York Statute of Limitations. The Court further finds that National's activities in New York were such that it could have been sued in New York, under the anti-trust laws, continuously throughout the period here involved."

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. Even If the Jurisdiction and Venue Issues Raised By Respondent's Statute of Limitations Defense Had Been Tried to a Jury, the District Court Would Have Been Required to Direct a Verdict in Respondent's Favor.

The basic error in the decision of the court below was its holding that the petitioner here and the respondent Bertha Building Corporation, in *National Theatres Corporation* v. *Bertha Building Corporation*, No. 761, were entitled to a jury trial of the jurisdiction and venue defenses raised by the

statute of limitations defenses in both cases. This error of law is a vital point in the petition for certiorari in No. 761 and is fully treated there. If that issue is determined in favor of petitioner in No. 761, such decision would, of course, be decisive of the issues raised by the petition here. We are directly concerned here only with petitioner's contention that the Court of Appeals erred in affirming the judgment of the District Court.

Petitioner having prevailed on the important question of law which is at issue in No. 761 thus comes here on what are essentially questions of fact and the three questions which it poses for consideration by this Court cannot be disguised as anything else. The net effect of petitioner's contentions is a demand that this Court examine the entire record to determine whether some factual finding made against petitioner might have been made upon disputed evidence. That, we submit, is not the function of this Court. But if it were it would be incumbent upon petitioner fairly and accurately to present the matter. That it has not done.

Petitioner unjustifiably attacks the court below and asserts that it assumed judicial powers it did not possess. It contends that the court below "made unwarranted findings of its own" (Pet. 13), made findings "unsupported by any finding of the District Court or by any ascertainable evidence" (Pet. 11) and that it "fashioned its own finding, unsupported in any way" (Pet. 20). The court below did no such thing. In its original opinion the Court of Appeals, while holding that the findings of the District Court were not clearly erroneous (Pet. 3a), directed its attention solely to the issues raised by the California statute of limitations defense and did not consider the effect of the New York statute of limitations. On the rehearing, it did consider the findings and the evidence in support thereof with particular regard to whether the action was barred in New York. Only then did it affirm the judgment of dismissal, noting that it had done so after "a careful review of

the evidence" (Pet. 18a). It held, moreover, that "the documentary evidence recited in Judge Galston's findings was overwhelming" and that regardless of what standard was applied "it is irrefutable that National was amenable to process in New York during the relevant period" (Pet. 18-19a). It then decided that if there had been a jury trial the District Court "would have been required to set aside a plaintiff's verdict on this issue" (Pet. 18a).

On the re-hearing, therefore, the court below reached the same conclusion when it considered respondent's activities in New York that Judge Learned Hand had reached when the case was heard originally. In his dissent Judge Hand had said, with respect to all the evidence (Pet. 8a):

> "However, it seems to me that as on the evidence here at bar Judge Galston would have been bound to direct a verdict for the defendant if the case had been tried to a jury, Judge Rayfiel's error is immaterial."

The specific findings set out in the opinion of the court below on the re-hearing, and which are now criticized by petitioner, not only were fully and completely supported by the record but there was no disputed evidence with respect to them. As the court noted, those findings relating to respondent's business activities in New York "were based solely on a stipulation and on evidence corroborated by documentary evidence" (Pet. 19a). Petitioner's comments in the parallel columns of its petition (Pet. 15-18) are either misleading and inaccurate or are irrelevant. For example, petitioner assails Finding 33 as based on disputed facts by asserting that respondent's agent, National Agency, gave up its New York office and moved to California in 1942 (Pet. 15-16). That assertion, if relevant,* is a mis-statement of the record. Agency did open an office in California in 1942 but only its treasurer and its accounting department moved there (Appellant's Ap-

*The relevant period was from December 8, 1931, to July 20, 1938.

pendix, 144a, 233a and Appellee's Appendix, 21-22a in No. 761). In fact, Agency, from shortly after its incorporation up to the time this action was instituted, continuously maintained an office in New York and performed substantial services for respondent there (Findings 33, 34, Pet. 54a).

Petitioner particularly criticizes the holding of the court below that "National did have officers in the state" (Pet. 14, 20) within the meaning of Section 19 of the New York Civil Practice Act, claiming that in this respect the Court of Appeals "fashioned its own finding, unsupported in any way" (Pet. 20). Petitioner further claims that this holding was unsupported by any finding of the District Court or by any ascertainable evidence and characterizes it as an independent finding (Pet. 11-14). Not only is this a captious criticism but it represents an inexcusable distortion of the record. Findings 30 and 31 of the District Court unequivocally state that National continuously had officers who lived and maintained their offices in New York. They read (Pet. 53-54a):

> "30. Spyros P. Skouras as President and a co-general manager of National from February, 1932 to November, 1934, and as Executive Vice-President and a co-general manager from 1934 to April, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. His office was also maintained at that address from 1942-1952, during which time he was Chairman of the Board of Directors of National. During all of these periods Mr. Skouras was also a director of National, and resided in New York.
>
> "31. Sidney R. Kent. President of National from November 14, 1934 to March, 1942, continuously maintained his office at 444 West 56th Street, New York, N. Y. During that period Mr. Kent resided in New York and was also a director of National. Other officers and directors of National continuously maintained their offices and residences in New York."

In the light of these findings what conceivable basis is there for petitioner's assertion (Pet. 20) that the court below fash-

ioned its own finding that respondent's officers were in fact continuously in New York for purposes of the limitations statute? Any such contention is patently unsustainable.

We point to these contentions not only because they are baseless and frivolous but because it is not the function of this Court to examine into the minutiae of the record below. The District Court had all the evidence before it, both testimonial and documentary, and made clear and specific findings. The Court of Appeals had the record in this case before it on three occasions and concluded after "a careful review of the evidence" (Pet. 18a) that the District Court had been right in dismissing the complaints because the evidence in support of the findings was overwhelming and because it was irrefutable that respondent was amenable to process in New York during the relevant period.

Petitioner's effort to create a constitutional issue by urging that the ruling below improperly denied it a jury trial is specious. This Court has considered and defined the function and authority of the trial judge in jury cases in a long line of decisions. As was said in *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, a federal judge "is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility" (p. 660).

In *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, this Court considered the duties of the court in situations where the evidence admitted of no doubt, saying (p. 343):

> "It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.' *Pleasants* v. *Fant*, 22 Wall. 116, 120-121. And where the evidence is 'so overwhelmingly on one side as to

> leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660. The rule is settled for the federal courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the views of the court. Such a practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' *Bowditch* v. *Boston*, 101 U. S. 16, 18; *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, 476, and cases cited; *Herbert* v. *Butler*, 97 U. S. 319, 320. The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned."

See also *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Delaware &c. Railroad* v. *Converse*, 139 U. S. 469, 472; *McGuire* v. *Blount*, 199 U. S. 142, 147-48; *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521, 524; *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478; and *Gunning* v. *Cooley*, 281 U. S. 90, 94.

Nor is there any conflict in the courts of appeal, where the principle has been succinctly expressed by the court below in *United States* v. *243.22 Acres of Land*, 129 F. (2d) 678 (2nd Cir., 1942), as follows (p. 684):

> ". . . had there been a jury trial of those issues, the judge would have been required to direct a verdict. There is no constitutional right to have twelve men sit idle and functionless in a jury-box."

Thus, the holding of the court below in no way departed from the accepted and usual course of judicial proceedings and its decision is not in conflict with applicable decisions of this Court or with those of other courts of appeal.

2. The Court Below Correctly Held that Respondent Could Have Been Sued in New York Because Respondent Directly and through Its Agents Transacted Business in New York throughout the Relevant Period.

The decision of the court below was predicated upon the overall business activities of the respondent in New York. Those activities are set out in the Findings of the District Court. Prior to 1936 respondent itself directly carried on the substantial business activities found by the District Court. After December, 1935, it continued to carry on many of its business activities directly, but also delegated at that time certain administrative and accounting functions to its agent, National Agency Corporation, a wholly-owned subsidiary which had entered into a contract of agency with respondent on December 3, 1935. (Pltfs.' Exhibit 19, Appellee's Appendix, 146-51a in No. 761). The District Court concluded that National Agency Corporation was respondent's agent within the meaning of Section 4 of the Clayton Act (Conclusion of Law 9, Pet. 61a) and its specific findings reflect the agency functions and activities which that company carried on for respondent in New York pursuant to its contract (Findings 10, 11, 33, 34, 42, 43 and 50; Pet. 39-40a, 54a, 56a, 59a). Such activities were held as a matter of law to be respondent's activities within the meaning of the Clayton Act. In its decision on the re-hearing the court below referred to certain of those findings as being corroborated by documentary evidence which was overwhelming (Pet. 18-19a). There was no dispute with respect to any of such activities.

Petitioner now attacks the holding of the court below in this respect by asserting that, in disregard of corporate entities and by piercing corporate veils, the court improperly ascribed to respondent the activities of National Agency Corporation. To support its contention that this was error, petitioner cites a number of "doing business" cases. It does not, however, deign to mention either Section 4 or Section 12 of the Clay-

ton Act and, significantly, avoids any discussion of cases construing those Sections. Petitioner either misconceives the holdings of the courts below or it has mis-stated them in the hope of raising some factual issues which it contends this Court should resolve. In either event its position is untenable.

Nothing could be plainer than the fact that National Agency after its organization in 1935 was respondent's agent within the meaning of Section 4 of the Clayton Act and that its activities constituted transacting business by respondent within the meaning of Section 12. That was the inescapable holding of both courts below. National Agency had no separate and independent business of its own. As its name implies, it was an agency and service corporation which rendered extensive services for respondent and respondent's theatre-operating subsidiaries (Finding 11, Pet. 40a). It occupied the same premises as respondent and the same individuals were, in the main, officers of the two companies (Finding 10, Pet. 39a).

The District Court, however, did not rest its conclusion that respondent was amenable to suit in New York solely upon the activities of National Agency after the organization of that company. It held that throughout the relevant period respondent itself was present transacting business in New York of a substantial nature and continuously had officers and other agents present in the jurisdiction acting for it and upon whom service could have been had. On the basis of these facts neither of the courts below was required to pierce any so-called "corporate veil" to conclude that respondent could have been sued in New York. There was nothing to pierce.

Petitioner thus has either misconceived or mis-stated the holdings of the courts below so far as they are applicable to respondent and its agent National Agency. The issues here are in no way analogous to those decided in *Cannon Mfg. Co. v. Cudahy Co.*, 267 U. S. 333, or in any of the other cases cited by petitioner (Pet. 22). All the cases upon which petitioner relies

were concerned with questions of *in personam* jurisdiction over corporations in non-federal causes of action. This Court has made it abundantly clear in *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, *United States* v. *Scophony Corp.*, 333 U. S. 795, and *United States* v. *Nat. City Lines*, 334 U. S. 573, that the Clayton Act provisions govern jurisdiction and venue in anti-trust actions. The decisions of this Court in those cases authoritatively establish that the relevant provisions of the Clayton Act were enacted for the express purpose of overcoming the "doing business" and "found" strictures which had been engrafted upon the venue provisions of the Sherman Act. Hence, the cases cited by petitioner, whatever their validity in other types of actions, have no application to anti-trust actions such as the case at bar. Under the standards established in *Eastman, Scophony* and *Nat. City Lines* respondent unquestionably was transacting business in New York both directly and through its agents and could have been sued there. Since respondent could have been sued it is apparent that it was not absent from the state and the statute of limitations continued to run. The complaint was properly dismissed as barred.

3. No Element of Estoppel Precluded Respondent From Establishing the Facts With Respect to Its Business Activities in New York.

So far as New York was concerned, petitioner's evidence in the District Court consisted almost entirely of excerpts from pleadings filed and statements made by respondent in two unrelated actions in the District Court in New York in which respondent was a defendant. It is petitioner's contention that the position taken by respondent in those cases was inconsistent with that taken by it at the trial and that respondent was thus precluded from establishing the actual facts as to its activities in New York.

The two actions in which these so-called inconsistent statements were made were instituted in 1938 and 1941, respec-

tively, and were subsequent to the relevant six-year period here involved.* In one case, *United States* v. *Paramount Pictures Inc.*, respondent formally denied in its answer, filed in 1939, that it had a place of business in New York and alleged that its place of business was in New Jersey (obviously an immaterial issue in an anti-trust action instituted by the Government). Respondent appeared and defended on the merits in that action and no issue was ever raised or litigated as to its place of business. In the other case, *Hillside Amusement Company* v. *Warner Bros. Pictures, Inc.*, respondent, as found by the District Court, raised the jurisdictional issue in 1941 because of tax considerations. Later, upon advice of counsel that it could not successfully contest jurisdiction in New York, respondent withdrew its defense, entered a general appearance, answered and defended the action (Finding 47, Pet. 57-58a).

The District Court rejected petitioner's theory of preclusion or estoppel as baseless, saying (Pet. 32a):

> "It cannot be too strongly emphasized that the facts are determinative of the issue whether the defendant was doing business or 'found' during the times in question. Certainly there is no statutory act which precludes or estops the defendant from maintaining its present position. Nor indeed has the plaintiff been able to show that an equitable estoppel should be charged against the defendant. It may be observed in this connection that there is no showing by the plaintiffs that the plaintiff was prejudiced by the legal defenses which the defendant may have raised in other actions to which the plaintiffs were not parties. I repeat: the facts themselves are determinative of the issue."

Judge Learned Hand, in his opinion in the court below, also could find no warrant for petitioner's theory and held that it was "plainly without foundation" (Pet. 8a).

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*It was conceded that the six-year New York statute, if not tolled, would have barred petitioner's action on December 8, 1937.

Petitioner has not pointed to any fact upon which any claim of preclusion or estoppel could be predicated. There is no claim that petitioner was a party or privy to any party in either action in which the claimed inconsistent statements were made. There is no assertion that petitioner ever changed its position in reliance upon any statements made by respondent to its detriment, or otherwise, or that petitioner even so much as knew of the cases in which respondent's statements were made. Moreover, respondent's amenability to suit in New York was never litigated and no judgment was ever rendered to the effect that it was not amenable to suit in New York.

With reference to the *Hillside* case, *supra*, the District Court specifically found that petitioner was not and could not have been affected by any proceedings in that case since respondent's statements were not made until after the New York statute had already barred petitioner's action. This appears in Finding 48 (Pet. 58a):

> "48. Neither of the plaintiffs in these cases was a party to the *Hillside* case. There was no evidence that any position taken or pleading filed by National in that case was known to or relied upon by either plaintiff in these cases. There was no evidence that plaintiffs were in any way misled by the filing of the motion by National or that they were at any time or in any way deterred from bringing an action against National by the filing of such motion. No element of estoppel in favor of the plaintiffs in these cases was created by the filing of the motion in the *Hillside* case. Furthermore, in view of the findings herein made, the activities of National in New York were such that the Statute of Limitations of New York had run against the plaintiff Gumbiner Theatrical Enterprises prior to the filing by National of any papers in the *Hillside* case."

The District Court further found that in the relevant six-year period here involved respondent had been sued in another

matter in New York in 1934 and had appeared and defended (Finding 49, Pet. 58-59a).

All of the cases cited and relied upon by petitioner (Pet. 23-24) were concerned with the well-established doctrines of equitable estoppel and estoppel by judgment. Petitioner has not made any attempt to relate the holdings in those cases to the facts in this case because the record below shows that no element of estoppel exists. Instead, petitioner has taken isolated phrases out of the context of the opinions in the cases cited and has attempted to tailor a theory based thereon.

We submit that neither this Court nor any other court has ever rendered a decision which has applied or supported petitioner's theory in a factual situation such as that present here. For example, and as indicating that all such cases rest upon application of the principles of estoppel, we refer to *Sturm* v. *Boker*, 150 U. S. 312, cited by petitioner (Pet. 24). There this Court adverted to the rules of estoppel and held that no showing had been made as to their applicability because no reliance had been placed upon the statements in question. Holding that there was no estoppel, this Court said (pp. 335-36):

> "This language did not mislead or induce either the defendants or the insurance companies to alter or change their position in any respect whatever, nor influence their conduct in any way."

So here. This Court in *Sturm* v. *Boker* then went on to note that if there were any estoppel it would have been against the party claiming it. As to this aspect of the case at bar, we respectfully direct this Court's attention to Findings 14-23 of the District Court, set out in the Appendix to the petition at pages 46-50a.

The facts below show that no element of an equitable estoppel or estoppel by judgment was or could have been present in this case. To summarize the indisputable facts established below, (a) the alleged inconsistent position was

never successfully maintained nor, indeed, was it ever litigated; (b) no judgment was ever rendered that respondent was not amenable to suit in New York; (c) the alleged positions taken in other proceedings were not clearly inconsistent, because in both such cases respondent appeared, answered and submitted to the jurisdiction; (d) petitioner was not a party or privy to any party to either of such actions; (e) petitioner was not and could not have been misled by any statement or claim made by respondent and did not change its position as a result thereof; and (f) no injustice vis à vis petitioner resulted from respondent's proof of the actual facts with respect to its business activities in New York.

Under these circumstances the District Court properly admitted respondent's evidence. Petitioner's contentions are devoid of merit.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case should be denied.

Respectfully submitted,

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April 3, 1958.

APPENDIX TO RESPONDENT'S BRIEF

Pertinent Statutes

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 12 of the Clayton Act, 38 Stat. 736, 15 U. S. C. § 22, reads:

> "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found."

Section 19 of the New York Civil Practice Act, so far as pertinent, reads as follows:

> "**Effect of defendant's absence from state or residence under false name.** If, when the cause of action accrues against a person, he is without the state, the action may be commenced, within the time limited therefor, after his coming into or return to the state. If, after a cause of action has accrued against a person, he departs from the state and remains continuously absent therefrom for the space of four months* or more, or if, without the knowledge of the person entitled to

*Prior to 1943 the provision was "one year" instead of "four months".

maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time limited for the commencement of the action. But this section does not apply in either of the following cases:

* * *

"2. While a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served."